

Repatriated to “Prison”

Landgrabbing as a tool of segregation in Myanmar

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The Rohingya, a religious and ethnic minority in Myanmar, have been systematically persecuted and discriminated against for decades. The government and the military (“Tatmadaw”) enforced various measures against the Rohingya, such as [forced labor, denial of education and basic healthcare, and extreme restriction on traveling](#), and have made parts of Rakhine State an “[open-air prison](#)” for many Rohingya. The Tatmadaw’s [repeated rounds of gruesome violence](#) against them significantly exacerbated the situation – most recently in 2017, when the UN High Commissioner for Human Rights called the government’s actions “[a textbook example of ethnic cleansing](#)”. The UN-mandated [Independent International Fact-Finding Mission](#) concluded that the scale and brutality of the conduct and surrounding policies circumstances may be sufficient to find “genocidal intent” of the perpetrators. Due to these repeated mass-atrocities, approximately one million Rohingya have sought refuge in Cox’s Bazar, Bangladesh.

The Myanmar and Bangladeshi governments [agreed](#) on a plan to start voluntary repatriation to Myanmar in mid-August. In late July, the Myanmar government [held talks with the refugees in Cox’s Bazar](#) to explain repatriation plans, but the refugees [feel left out of the discussion and are skeptical about their safety and their prospects of getting full rights at citizens upon returning](#). On the day of the repatriation, [not a single refugee volunteered to return](#). The refugees’ worries are well-founded. Behind the international repatriation discussions and explanatory sessions in Cox’s Bazar, the Tatmadaw and the civilian government have been conducting mass-scale land grabs, taking advantage of the Tatmadaw’s destruction of Rohingya villages during and after the 2017 violence and the resulting absence of the Rohingya residents in many parts of Rakhine State.

Remaking Rakhine

The land is being reallocated to the [security forces, government facilities](#), and [housing for non-Rohingya](#). Some of the land is occupied by poorly-built [transit camps](#) and [relocation camps](#) for returning refugees, but a majority of the newly-built houses are not for the Rohingya, according to one [report](#). Even [undamaged houses have been demolished](#), and [some Rohingya villagers have been evicted to make space for a Border Guard Police Base](#). The government [maintains](#) that its intention is to merely to rebuild conflict-torn Rakhine State, but the actual use of land shows that they are “[remaking Rakhine State](#)” by expropriating land from the Rohingya.

The [leaflet](#) distributed to the refugees in Bangladesh by Myanmar government authorities did not provide any policies as to where the Rohingya should build

their livelihood upon repatriation. The landless and homeless Rohingya may be indefinitely confined to [transit centers](#)

The civilian government has claimed that it will use national law to seize the Rohingya's land that were burned down by the Tatmadaw and local vigilantes. The mass-arson was followed by [the government's demolition](#) of Rohingya villages, leaving the Rohingya without any hope for return, both because of the re-allocation of the land and [extreme difficulty of proving that they legally resided there before evacuating](#).

[According to](#) the Union Minister for Social Welfare, Relief and Resettlement, the [Natural Disaster Management Law](#) ("NDM Law") provided the legal basis for the demolitions. The NDM Law authorizes the government to confiscate and redevelop burnt land, [irrespective of its previous status](#) and regardless whether the cause of the fire was natural or man-made. Under the Law, Rohingya citizens who return to their homeland could be directed to leave the "areas and buildings at risk" (Section 9(i)(l)) and may even be incarcerated if they enter areas or buildings affected by the *disaster* without permission (Section 30(b)).

The government's application of the NDM Law to the land burnt by the military during the operations violates its international obligations. Applying the Law to the current situation, in which the Tatmadaw burned the land, would result in a manifestly absurd result – the government can legitimately confiscate land through arbitrarily burning land. As the Special Rapporteur stated in her [report](#) submitted to the Human Rights Council, such interpretation is incompatible with Myanmar's obligation as a [party](#) to the [International Covenant on Economic, Social and Cultural Rights](#), which requires that the government recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food . . . and housing" (Art. 11(1)). It is also inconsistent with Myanmar's [support](#) for the adoption of the [Universal Declaration of Human Rights](#), which recognizes the right to own property and the right not to be arbitrarily deprived of one's property (Art. 17).

Regardless of whether the mass-land grab was an intended consequence of the genocidal violence or exploitation of an opportunity created by it, the Rohingya have the right to claim their land and livelihood and homes back. One of the fundamental principles of Myanmar's [National Land Use Policy](#) (2016) is the government's recognition and protection of legitimate land tenure rights of ethnic minorities, including the Rohingya (Section 8(a)). If the government claims that the expropriation was for a public purpose, they should, as a minimum, afford the Rohingya all the procedures provided under the old [Land Acquisition Act](#) (1894) and its revision (The Land Acquisition, Resettlement and Rehabilitation Law, 2019).

The "largest land grab in Myanmar's history"

In addition to the ongoing "redevelopment" conducted under the NDM Law, the land grab conducted under the [Vacant, Fallow and Virgin Lands Management Law](#) ("VFLM Law," 2012) and its [2018 revision](#) are further endangering the Rohingya's rights to ancestral land in "[what could be the largest land grab in Myanmar's history](#)."

Around [30% of Myanmar's total land area](#) is “vacant,” “fallow,” or “virgin” according to the law, [82% of which is located in ethnic minority states](#). The VFV law applies to [42% of Rakhine State](#). The government may reallocate such to domestic and foreign investors and landless and smallholder farmers (VFV Law (2018) Section 4; 5; 5-a). The problematic 2018 revision of the Law requires the residents and farmers of “vacant” or “fallow” land to apply for a 30-year permission for continued land use (Section 11; 11-a; 22). Applying for [permission would mean that the original right holders to the land would accept government ownership and control over the land](#). Their customary entitlement to use the land for an indefinite period would be lost. However, by refusing to register, residents and farmers would risk incurring fines or even imprisonment. (Section 27; 27-a).

Upon expiration of the 6-month grace period to apply for the permission (Section 22(b)(1)) in March 2019, unregistered land could be expropriated by the government (Section 22(b)(2)). According to a [survey](#) conducted a month before the expiration of the grace period, 58% of farmers residing in various states and regions in Myanmar were unaware of the law. Moreover, few respondents knew of the registration deadline. [Land grabs for undocumented land](#) and [criminal prosecution for “trespassers”](#) under the VFV law have already taken place.

The process was unduly prejudicial against ethnic minorities, many of whom do not read or write Burmese. For the Rohingya, the situation has been worse due to them being [mostly illiterate](#). Participating in the registration process either [at the local or central authorities](#) has been [impossible](#) for the refugees. Gathering necessary documents supporting their title to the land is an undue hardship for the Rohingya, who had to constantly relocate in fear of violence.

Women were further prejudiced against because of their [lower literacy rate](#) compared to men. Considering that around [14% of the refugee households in Cox's Bazar are led by single mothers](#) (as of November 2017), women's participation in the process is also crucial to secure the livelihood for many families. Moreover, although the Law does not apply to “customary land” (Section 30-a(b)), the law [does not state the criteria under which the land will be categorized](#) or [how ethnic minority communities can apply for such exception](#). [Few people know that such exceptions exist, making them vulnerable to investors](#) who exploit the farmers' lack of access to legal aid.

Foreign Investment: Fuel for Land Grabs, High Risk for Investors

Foreign investors' appetite for land in the resource-rich and geopolitically important Rakhine State is enormous. Unfortunately, economic development has historically fueled land grabs in Myanmar. [Some](#) suggest that economic interest was behind the violence against the Rohingya. Facts support such speculation: [The upsurge in violence since 2012 were accompanied by its opening up to foreign investment](#), and there was a [drastic increase](#) in land reallocation to corporations in predominantly Rohingya areas in 2017. International investment has also supported the clearance operations through financing the military: [Fourteen foreign companies have joint ventures with Tatmadaw](#)-related businesses, and some companies even [provided donations](#) to the Tatmadaw amidst the widely-reported genocidal attacks of 2017.

Investment in Rakhine State does not only contribute and encourage human rights violations but also might subject the investor to unforeseeable risk under Myanmar contract law. There are high risks associated to investment involving illegally acquired land. Contracts involving use of unlawfully acquired land might be void under Section 23 of the [Myanmar Contract Act](#), which provides that contracts with unlawful objects or considerations are void. Objects or considerations that are immoral, opposed to public policy, or involve or imply injury to the person or property of another is considered unlawful. Expropriation of land is allowed under the government's current interpretation of the NDM Law, but such reading is untenable. It is difficult to predict what would happen, if and when the government corrects its interpretation of the Law.

Foreign investors might also be left without the right to seek compensation for losses or restitution of benefits conferred against the government or military or any Myanmar counterparty to the void contract. Section 56 of the Contract Act provides that a party is not entitled to damages if they knew or should have known that the counterparty did not have the legal right to grant rights to use the land. Investors also might not be able to obtain restitution under Section 65 of the Contract Act, depending on its interpretation. An Oxford [treatise](#) on Myanmar contract law argues that restitutions should not be allowed for contracts that are void due to illegality, although the statute does not provide for such exceptions.

Despite reports of land grabs and other illegal and discriminatory land acquisition practices, some governments are supporting their companies' efforts to invest in Rakhine State. The Rakhine State Government and Myanmar Investment Commission, together with the Japan External Trade Organization (JETRO) and the Japan International Cooperation Agency (JICA) has jointly organized the [Rakhine State Investment Fair](#) in February 2019. The two Japanese governmental organizations [provided a large part of the funding. Five hundred business people](#), mainly from Asian countries such as [China, India, Japan, Korea, and Thailand](#), as well as some [UN officials and diplomats](#) participated in the fair.

Rakhine State needs economic development, as Aung San Suu Kyi stated in one of her [speeches](#), and international investment might serve that goal. However, mass-violence against the Rohingya and subsequent land grabs are not only unethical and illegal but also unsustainable in the long run, unless the government succeeds in preventing their repatriation or indefinitely confining them to domestic camps. Investing in Rakhine State as it stands would only fuel violence and exacerbate the conflict.

International pressure required

Preventing land grabs is not only important to protect the Rohingya's right to inherited land, but also to prevent their indefinite confinement in government-run centers and camps. Such segregation of the Rohingya would strengthen and solidify [Myanmar's apartheid regime](#) and renders them even more vulnerable against targeted attacks and uncontrolled violence. Prior to repatriation, the Rohingya must be given credible reassurances by the government and the Tatmadaw that they will be able to return to their homeland or at least be provided adequate remuneration

and afforded an opportunity to relocate freely. Such reassurances must be backed by international support and pressure for compliance.

It is unlikely that the Myanmar government or the Tatmadaw will change course on its own initiative, but it might do so with sufficient international pressure. One way to put pressure is to withhold investment: Because [some foreign investors are refraining from investing in Myanmar](#) to avoid [contributing to](#) or being associated with human rights abuses, the Myanmar government badly needs investment for economic development. Another way is through international prosecution. Forced deportation in the context of a widespread and systematic attack against the Rohingya population may violate Article 7(1)(d) of [Rome Statute of the International Criminal Court](#) (2002). [Some argue](#) that the ICC may be able to bring genocide charges although Myanmar is not a member state of the ICC. The Court is currently [conducting a preliminary examination](#) on the situation, and the Prosecutor [requested](#) permission to open a formal investigation in July this year.

The international community thus has leverage over Myanmar if the countries and the enterprises can cooperate in exerting pressure on the government. Repatriation should not result in the Rohingya being indefinitely trapped in a “prison” because of their ethnicity and faith. It is now time to end support to the apartheid regime and show solidarity with the [world’s most persecuted ethnic minority](#).

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